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THE  
AMERICAN LAW REGISTER.

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GOOD-WILL.

(Continued from p. 341.)

5. *Sale of the good-will of a going concern.*

Where a partner sells out all of his share in, or his share of the stock in a going concern, the presumption is that he meant to include the good-will, though the latter be not specifically mentioned. In *Churton v. Douglas*, Johns. Ch. R. 174, V. C. Wood says: "I apprehend, that, when a man, who has been a partner in a firm, assigns his share and is paid for his share as it stands in the partnership books, he sells his share as in a going concern, and is in a very different position from that which he would have occupied upon a mere dissolution of the partnership, in the ordinary way, where the affairs of the whole concern would have to be wound up, and he would only get what it would produce. \* \* He gets therefore the benefit of his share in the business as a going concern."

6. *When a firm is dissolved during the lifetime of all the partners, the right to use the firm name is common to all alike.*—This was decided in the case of *Banks v. Gibson*, 34 Beav. 566, by Sir J. ROMILLY, M. R., who says: "If the partners chose to divide the partnership assets each is at liberty to use the trade-mark, just as much as before. If two persons carried on business as *Child & Co.*, and they thought fit to separate, each might call himself *Child & Co.*, and there is nothing to prevent him from so doing. It is the name by which they are known and the business carried on. If the plaintiffs had stipulated that the defendant was not after the dissolution to use the name or style, she ought to have paid a fair proportion of the value of the trade-mark, but

it was not so, they divided the common assets and left this asset to be enjoyed in common; in my opinion they are both entitled to use the style or firm of *Banks & Co.*, and consequently that the whole case made by this bill fails." In *Williams v. Wilson*, 4 Sand. Ch. 379, exactly the opposite view was taken, and it was said that an injunction would be granted against all of the members of a dissolved partnership to prevent them from conducting the same business in New York, unless the good-will of the establishment (a private insane asylum) were bought by one of them. It would seem, however, to be just to permit either partner to treat the good-will as a partnership asset and to compel a sale of the good-will (including the name) in the absence of stipulations agreeing to divide it. It would seem unjust, where one partner would derive immense benefit from the use of the good-will and the others none whatever, to permit the former to enjoy this without compensation, though its value had been the result of the labor and credit of others in conjunction with himself.

7. *Where a portion of the value of the good-will of the business done by a corporation arises from its name, made up from the names of several of the original stockholders, so used without their objection, the corporation acquires a right of property in its name, and the owners of those names must use them until the dissolution of the corporation, subject to the rights of the other corporators.*

In the recent case of *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manufacturing Co.*, 37 Conn. 278, the plaintiffs were a corporation organized and who had acquired a considerable reputation under the name of *Holmes, Booth & Haydens*. Holmes, Booth & H. H. & J. A. Hayden were among the original stockholders, the two former continuing so at the time that this suit was brought, but having disposed of all but a very inconsiderable number of their shares. In 1868-9, Holmes, Booth and Atwood, who had been one of the directors of the plaintiffs, formed with certain other persons a new corporation under the name of *The Holmes, Booth & Atwood Manufacturing Co.*, and engaged in the same town with plaintiffs in the same business. Much confusion in their correspondence arose on account of the similarity of the names of the corporations, and it was averred by plaintiffs that by reason thereof dealers were likely to be misled into the belief that the companies were the same.

The Supreme Court of Errors advised the Superior Court to

grant an injunction against the use by the respondents of the name under which they were trading. SEYMOUR, J., said that there was no difference, as regarded the use of the name, between a corporation and partnership; that the intention on the part of the respondents to commit fraud was not necessary in order for the relief sought, which depended on the injury to the party aggrieved; that it was of no importance that Holmes & Booth might give up all connection with the plaintiffs; and finally that until the dissolution of the corporation plaintiff, Holmes & Booth must use their own names subject to the rights of the petitioners.

8. *The ground of relief in equity against the use by another of a firm-name or trade-mark is property. But relief will not be granted if the plaintiff has been guilty of misrepresentation, in his marks or otherwise, calculated to deceive the public.*

In *The Leather Cloth Company Limited v. The American Leather Cloth Company Limited*, 4 De G., J. & S., Lord WESTBURY, Chancellor, reversed the decree of the Vice-Chancellor (WOOD) and dismissed the bill of plaintiffs praying for an injunction restraining the defendants from using the name of *L. R. & C. P. Crockett*, or the name of *Crockett & Co.*, stamped or affixed to any fabric manufactured by them, or so introduced thereon as to represent the fabric manufactured by the defendants as that manufactured by the plaintiffs, &c. The case below is reported in 1 Hemming & Miller 271.

The Chancellor said: "At law the remedy for the piracy of a trade-mark is by an action on the case in the nature of a writ of deceit. This remedy is founded on fraud, and originally it seems that an action was given not only to the trader whose mark has been pirated, but also to the buyer in the market, if he had been induced by the fraud to buy goods of an inferior quality. In equity, the right to give relief to the trader whose trade has been injured by the piracy appears to have been originally assumed by reason of the inadequacy of the remedy at law, and the necessity of protecting property of this description by injunction. But although the jurisdiction is now well settled, there is still current (in several recent cases) language which seems to me to give an inaccurate statement of the true ground on which it rests. In *Croft v. Day*, 7 Beav. 88, and *Perry v. Truefitt*, 6 Beav. 73, Lord LANGDALE is reported to have used words which place the jurisdiction of this court to grant relief in cases of piracy of trade-marks entirely on

the ground of the fraud that is committed when one man sells his own goods as the goods of another. The words of the learned judge are, "I own it does not seem to me that a man can acquire property merely in a name or mark," and in like manner the learned V. C. (WOOD) whose decision I am now reviewing, is reported to have said: "All these cases of trade-mark turn not upon a question of property but upon this, whether the act of the defendant is such as to hold out his goods as the goods of the plaintiff." (1 H. & M. 287.) But with great respect this is hardly an accurate statement; for, first, the goods of one man may be sold as the goods of another, without giving to that other person a right to complain, unless he sustains or is likely to sustain from the wrongful act some pecuniary loss or damage; *Clark v. Freeman*, 11 Beav. 112; and, secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised at all. The court will grant relief though the defendant had no intention of selling his own goods as the goods of the plaintiff, or of practising any fraud either on the plaintiff or the public." *Millington v. Fox*, 3 M. & Cr. 338, and *Welch v. Knott*, 4 K. & J. 747, approved.

"Imposition on the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord THURLOW in *Webster v. Webster*, 3 Swanst. 490 n.: 'The fraud upon the public is no ground for the plaintiff coming into this court.' [But] imposition on the public becomes the test of the property in the trade-mark having been invaded and injured, and not the ground on which the court rests its jurisdiction.

"The representation which the defendant is supposed to make that his goods are the goods of another person is not actually made otherwise than by his appropriating and using the trade-mark, which such other person has an exclusive right to use in connection with the sale of some commodity.

"It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them. \* \* \* The true principle therefore would seem to be that the jurisdiction of the court, in the protection given to trade-marks, rests upon property, and that the court interferes by injunction, because that is the only mode by which property of this description can be effectually protected.

“The same things are necessary to constitute a title to relief in equity, in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property.”

This case was affirmed on appeal in the House of Lords (11 H. of L. Cas. 523), Lord CRANWORTH saying: “The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured. If the word ‘property’ is aptly applied with reference to copyright, I see no reason for doubting that it may with equal propriety be applied to trade-marks. But I further think that the right to a trade-mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser.” [Lord CRANWORTH then put the case of a trade-mark, consisting of the name of the manufacturer, and asked how far it might be used as a trade-mark after his death, or after the sale of the manufactory to a purchaser.] “The question in every such case must be, whether the purchaser in continuing the use of the original trade-mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark. In such a case I see nothing to make it improper for the purchaser to use the old trade-marks, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory that he had purchased.” His Lordship, however, decided that in the particular case there had been no substantial imitation of plaintiff’s trade-mark. Lord KINGSDOWN affirmed the decision on that ground, and on the additional one that plaintiffs had been guilty of misrepresentations in pretending by their trade-mark or advertisement that their cloth was manufactured by *Crocketts*, was patented and was tanned. The alleged misrepresentations lay in the use of the mark of the words *Crocketts & Co. Tanned Leather Cloth, Patented, and J. R. & C. C. Crockett, Manufacturers*, all of which, if considered as averments of the state of affairs existing when the suit was begun, were untrue. Lord WESTBURY, who had decided the case below on the ground last mentioned, gave the additional reason that there was no substantial imitation in the two advertisements or marks.

"Suppose," says Lord WESTBURY (in *The Leather Cloth Co. Limited v. The American Leather Cloth Co. Limited*, 4 DeG. J. & S., at p. 143), "a partnership to have been formed a century ago, under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered, without any doubt, in the negative.

"But suppose an individual or a firm to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such person or firm, and that the name has gained currency and credit in the market (there being no secret process or invention): could such person or firm, on ceasing to carry on business, sell and assign the right to use such name and mark to another firm, carrying on the same business in a different place? Suppose a firm of *A. B. & Co.* to have been clothiers in Wiltshire for fifty years, and that broadcloth marked *A. B. & Co., Makers, Wilts*, has obtained a great reputation in the market, and that *A. B. & Co.*, on discontinuing business, sell and transfer the right to use their name and mark to a firm of *C. D. & Co.*, who are clothiers in *Yorkshire*; would the latter be protected by a court of equity in their claim to an exclusive right to use the name and mark of *A. B. & Co.*? I am of opinion that no such protection ought to be given. Where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion, which is false, I think no property can be claimed for it, or, in other words, the right to the exclusive use of it cannot be maintained.

"Property in a trade-mark is, as has been already observed, the right to the exclusive use of some mark, name or symbol in connection with a particular manufacture or vendible commodity, consequently the use of the same word in connection with a different article is not an infringement of such right of property."

In *Wotherspoon v. Currie*, 27 L. T. N. S. 393, the House of Lords made a decree restraining defendant perpetually from using

the word "Glenfield," upon any labels affixed to packages of starch manufactured by him, from representing the starch manufactured by him to be "Glenfield starch," and from selling it as such. The Lord Chancellor (HATHERLEY) rested his decision on the ground of deception of the public and consequent injury to the plaintiff; Lord CHELMSFORD said: "Where the trade-mark is not actually copied, fraud is a necessary element in the consideration of every question of this description; that is, the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark." Lord WESTBURY planted his decision upon the ground of property, for the reasons so admirably expressed in his opinions already cited. The word "Glenfield," (the name of a small hamlet in Scotland), had, he said, acquired, in connection with a particular manufacture of starch, a secondary signification, viz.: the starch manufactured by plaintiffs. As a denomination of starch it had become the property of plaintiffs. It was their right and title, and this property had been invaded by the defendants.

*Bury v. Bedford*, 4 DeG. J. & S. 352. This was a bill brought by the purchaser of the joint estate of the partners in the firm of *Bedford, Burys & Co.*, asking that the defendant, who had been one of the partners in that firm, should be restrained from using, or granting to any one the right to use, a corporate trade-mark (which consisted of the figure of a lion couchant, surmounted by crossed arrows, with four initial letters, viz. *J. O. B. S.*, within the spaces formed by the arrows), or the mark *Wm. Ash & Co.*, &c., or to prevent the plaintiff from having the exclusive use of the said trade-marks.

Lord Justice TURNER said that there was nothing in the character of the mark (above described) to prevent its assignability. He thought that the objection to a mark that it was so completely personal as of necessity to import that the goods sold under it had been manufactured by a particular individual, was one which applied rather to the use of the mark when assigned than to the power of assigning it. It was evident that a mark originally personal might become appropriated to goods manufactured at particular places. He held, that, under the creditors' deed by which the separate estate of the partners as well as the firm assets had been conveyed to trustees, the trade-mark passed.



He abstained from giving any opinion whether the trade-mark would have passed to the assignee. As to the use of the mark *W. Ash & Co.*, he held that on the formation of a partnership, where one partner has the right to use a trade-mark, the latter passes into the partnership assets. Injunction granted.

In *Bradbury v. Bardin*, 35 Conn. 577, an action on the case for fraudulent misrepresentation was brought by the plaintiff, who had bought from the defendant, a physician, his practice, upon the representations of the latter that he was a regular practitioner and his business such as a regular physician could engage in. Held, that evidence to show that defendant's practice was irregular and eclectic, and to prove specific acts of irregular practice as an abortionist, was admissible; and a verdict having been given for plaintiff a new trial was refused.

In *Spier v. Lambdin*, 45 Ga. 319, an injunction was granted restraining defendant, who had induced plaintiff to purchase of him the lease of an academy, under the understanding that if plaintiff would buy, defendant would give up teaching in the neighborhood during the lease.

In *Stone v. Carlan*, 3 Mo. Law R. 360, *Howard v. Henriques*, 3 Sandf. 725, and *Marsh v. Billings*, 7 Cush. 322, injunctions were granted at the suits of persons holding contracts with hotel proprietors, and in *Deig v. Lamb*, 6 Robertson (N. Y.) 535, at the instance of the hotel proprietor, restraining defendants, who were coach-proprietors, from using the names of the hotels *Revere House*, *Irving House* and *Prescott House*, &c., upon their coaches and on the caps of the drivers, &c., after a license to do so had expired.

In *Christy v. Murphy*, the use of the name *Christy's Minstrels*, as a designation of a company of negro minstrels, was restrained at the instance of *Christy*, the organizer of the band. In *Woodward v. Lazar*, 21 Cal. 448, the plaintiff had occupied a leased building as a hotel, under the name *The What Cheer House*; subsequently he gave up that building, moving into an adjoining one, where he continued the business under the same name. Defendants then opened a hotel in the first building, under the name *The Original What Cheer House*. They were restrained by injunction.

In *Sheldon v. Houghton*, 5 Blatch. C. C. 285, it was said by SHIPMAN, J., that "good-will must always rest upon some principal and tangible thing, and \* \* \* it can never arise as an asset of a

partnership, where the members only contribute as capital their professional skill and reputation, however intrinsically valuable these may be."

In this case it was held that the right resting upon the custom of the trade, where a firm has published a book, not the subject of statute copyright, to exclude others from engaging in the publication of the same book, is not good-will, and that such a right cannot be protected in equity.

In *Comstock v. White*, 10 Abb. Pr. R. 264, note, it was held that in the absence of a patent all persons had an equal right to manufacture and sell a patent medicine, and this rule was not altered by the fact that the defendants, before entering into partnership with the plaintiff, represented to them that they were the proprietors of the patent medicine; for the plaintiff must be presumed to have known the law, and had no right to rely on such representations. The defendants could not be restrained from using the firm name of *A. J. White & Co.* (*A. J. White* being one of them), because *A. J. White* was formerly in partnership with the plaintiffs, and the firm name was then *A. J. White & Co.* But defendants were restrained from using the name *Dr. Morse's Indian Root Pills*, used as a trade-mark by the plaintiffs, and from using labels, &c., so like those used by the plaintiffs, as to cause the public to believe that the medicine sold by the defendants was manufactured by plaintiffs.

The executors and sons of the inventor (one *Lieutenant Robert James*) of a valuable ointment known as *Lieutenant James's Horse Blister*, carried on the manufacture after his death. Held that an injunction would not lie restraining a grandson of the inventor named *Robert Joseph James*, who had accidentally but not fraudulently become possessed of the recipe, from manufacturing and selling the ointment, describing it by the name of the inventor, provided people were not led to suppose that the preparation was still manufactured by the inventor.

*McAndrew v. Bassett*, 4 DeG., J. & S. 380. As to how long user of a name for a trade-mark is necessary to acquire property in it, Lord WESTBURY said: "But, it is urged that this word *Anatolia* is a general expression; is, in point of fact, the geographical designation of a whole tract of country wherein liquorice-root is largely grown, and is therefore a word common to all, and in it there can be no property.

“That argument is merely a repetition of the fallacy I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public.”

*Burgess v. Burgess*, 3 DeG., M. & G. 896. Lords Justices KNIGHT BRUCE and TURNER. Injunction refused restraining a son from carrying on business in his own name, which had been carried on by and gained a great reputation under his father, in the absence of proof of fraud.

*Pidding v. Howe*, 8 Sim. 477; *Perry v. Truefitt*, 6 Beav. 66; *Flavel v. Harrison*, 10 Hare 467; *Leather Co. v. American Leather Co.*, 4 DeG., J. & S. 137; s. c. 11 H. L. Ca. 523. The case of *Ford v. Foster*, 27 L. T. R. N. S. 219 (1872), is rather a singular one. Ford had for many years sold an unpatented shirt under the name of “*Ford’s Eureka Shirt*.” In advertisements and invoices he falsely described it as patented, but not in the trade-mark. Foster subsequently began using the mark of “*Foster, Porter & Co’s. Improved Eureka*.” Vice-Chancellor BACON refused an injunction against defendant. On appeal the Lords Justices (JAMES and MELLISH) granted a perpetual injunction, deciding, 1st, that *Eureka* was not *publici juris*; 2d, that the imitation by defendant of plaintiff’s trade-mark was substantial and injurious; 3d, that the false representation by plaintiff that he was patentee of the shirt, not being in the trade-mark itself but in an entirely collateral representation, was no ground for refusing the injunction; though *semble*, that, if defendants had been injured by that misrepresentation, they might bring an action on the case against plaintiff. In *Sykes v. Sykes*, 3 B. & C. 541, there was an actual though innocent misrepresentation, the trade-mark itself stating that the article was patented. The article had been patented and the patent had run out. The court would not disturb verdict obtained by plaintiff. In *Ford v. Foster*, *supra*, Lord Justice MELLISH, in commenting on *Sykes v. Sykes*, says: “I am of opinion that probably it would be held at law that if the trade-mark itself contains a false representation no action could be maintained; and so

also if the trade was a fraudulent trade, I have no doubt that no action could be maintained."

In *Palmer v. Harris*, 8 Am. Law Reg. N. S. 137 (10 P. F. Smith 156), plaintiff sold cigars, made in New York, and used a label with the words "*Golden Crown, L. P. Habana*" thereon. Sometime afterwards defendant began using a somewhat similar label, on which were the words "*Golden Crown, Fabrica de Tabacos de les Mejores Vegas, &c.,*" and outside the border in small letters "Ent. according to Act of Congress, A. D. 1858, by Lorin Palmer, in the c'k's office in d't'c't of the S. d't of N. Y." Defence was that complainant's trade-mark was untrue, as his segars were manufactured in New York. An injunction was refused on this ground.

As regards what is *colorable imitation*, see the late case of *Cope v. Evans*, 30 L. T. R. N. S. 292 (May 2d 1874).

A. S. B.

(To be continued.)

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## RECENT AMERICAN DECISIONS.

### *Supreme Court of Pennsylvania.*

#### PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD CO. v. STINGER.

The plaintiff was driving a horse known to be afraid of locomotives upon a road parallel and contiguous to defendants' railroad. The engineer of an approaching train blew the whistle of the locomotive once or twice (there being conflicting evidence on this point), which caused the horse to run off, and the plaintiff was thereby thrown from the vehicle and injured.

*Held*, that the question whether the use of the whistle the second time was negligent was for the jury, but not whether any use thereof was such. The nature of the place and the habit of the company were conclusive that the whistle should be blown once, and the jury should not have been permitted to say that this was negligence.

*Held*, further, that the use of a horse known to be afraid of locomotives in the vicinity of a railroad was contributory negligence.

CASE for negligence. The *narr.* contained a single count, averring that the plaintiff was on September 1st 1871, lawfully driving his horse and wagon along Gray's Ferry Road, by the side of which a part of defendants' railroad is situated; that then and there the defendants so carelessly and improperly propelled a locomotive and train of cars along their said road, and made such great noise and shrieks by blowing the whistle of the said locomotive, that by the defendants' carelessness, the plaintiff's horse